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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~366~~ 12

ANDREW G. NELSON, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ADVANCE TRANSPORTATION CO., INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the Interstate Commerce Commission, is reported at 63 M. C. C. 407 and is set forth in Appendix A, *infra*, pp. 27-41.

The opinion of the United States District Court for the Northern District of Illinois is as yet unreported. The court's memorandum opinion, including findings of fact and conclusions of law, is set forth in Appendix C, *infra*, pp. 43-52. Judge Perry's dissenting memorandum opinion is set forth in Appendix D, *infra*, pp. 53-59.

JURISDICTION.

1. This is an action to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission (Appendix B, *infra*, p. 42, brought under Sections 1336 and 2325 of Title 28 of the United States Code. (28 U. S. C. 1952 ed., Secs. 1336 and 2325.)

2. The judgment of the district court, sought to be reviewed, was dated and entered on June 13, 1956. (Appendix E, *infra*, p. 60.) Notice of appeal was filed in the United States District Court for Northern District of Illinois (Eastern Division) on July 2, 1956.

3. Jurisdiction to hear this appeal is conferred on this Court by Section 1253 of Title 28 of the United States Code (28 U. S. C. 1952 ed., Sec. 1253.)

4. The following cases sustain the jurisdiction of this Court to entertain a direct appeal from an order of a district court of three judges denying an injunction against the operation of an order of the Interstate Commerce Commission:

American Trucking Association v. *United States*, 326 U. S. 77.

Alabama Great Southern Railway Co. v. *United States*, 340 U. S. 216.

American Trucking Association v. *United States*, 344 U. S. 298.

STATUTES INVOLVED.

Interstate Commerce Act, Part II (Act of August 9, 1935, c. 498, 49 Stat. 543):[1]

> Sec. 209. (a) No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in *bona fide* operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. (49 U. S. C. 1952 ed. Sec. 309.)

Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 237):

> Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—
>
> * * * * *
>
> (b) SUBMITTALS AND DECISIONS.
>
> * * * * *
>
> All decisions * * * shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the

1. Originally cited as the Motor Carrier Act, 1935.

material issues of fact, law, or discretion presented on the record * * *. (5 U. S. C. 1952 ed., Sec. 1007.)

Sec. 10.

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (5 U. S. C. 1952 ed., Sec. 1008.)

QUESTIONS PRESENTED.

I. Whether or not the contract carrier by motor vehicle grandfather permit granted to appellant's predecessor gave him *all* of the rights to which he was entitled under Section 209(a) of Part II of the Interstate Commerce Act.

A. If so, does the Commission's cease and desist order wrongfully restrict the scope of the operations authorized by that permit because of an erroneous interpretation of its language, arrived at through the application of (1) erroneous canons of interpretations and (2) subtle definitions originated by the Commission long after the permit was granted?

B. If not, may the Commission now deprive appellant of operating rights guaranteed by Section 209(a) simply because the language used by the Commission in granting the permit failed to describe the full scope of the grandfather operations?

II. Whether or not the Commission's report should be set aside for lack of findings and conclusions with respect to all material issues of fact and law, with reasons and bases therefor, as required by Section 8(b) of the Administrative Procedure Act.

III. Whether or not the Commission's cease and desist order should be declared unlawful under Section 10(e) of the Administrative Procedure Act as being (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) in excess of its statutory limitations or short of appellant's statutory right; (3) entered without observance of procedure required by law; or (4) unsupported by substantial evidence.

STATEMENT.

On March 13, 1942, the Interstate Commerce Commission (hereinafter sometimes referred to as the Commission) issued to Andrew G. Nelson, doing business as Nelson Warehouse & Express Company, a motor contract carrier permit to transport, within a ten state area, the following commodities:

> "*New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores."

In 1951, Nelson incorporated his business under the name Andrew G. Nelson, Inc., and on June 18, 1951, the Commission issued a new permit to the corporation (appellant herein), embracing the same operating rights as the old permit.

On January 21, 1954, the Commission ordered an investigation to determine whether or not appellant had been transporting various commodities (enumerating them) which were not within the scope of the commodity description of its operating permit.

The matter was referred to one of the Commission's examiners and a hearing was held at Chicago, Illinois in May of 1954. Various parties intervened to support the position of the Commission's Bureau of Inquiry and Compliance (hereinafter sometimes referred to as the Bureau).

At the hearing, appellant did not contest that it had, between July 31 and December 7, 1953, transported in interstate commerce for consignors (none of which was a drug store in the usual sense) the commodities in question to various consignees. On the other hand, the Bureau did not contest that the commodities transported do constitute part of the stock in trade of a drug store. Rather, the Bureau's position was that the so-called intended use theory applied

in this case, so that those commodities could not be transported under appellant's authority to haul stock in trade of drug stores unless, when accepted for shipment, they were earmarked or intended for use as part of the stock in trade of a drug store. (Appendix A, *infra*, pp. 35-35.)

At the hearing, the Bureau's position was that the language of appellant's permit was ambiguous,[2] whereas appellant contended that the language was not ambiguous. After the hearing, however, the Bureau switched its position and decided that the language of the permit was not ambiguous. (Appendix A, *infra*, p. 30.) Nevertheless, during the hearing, both parties introduced documentary evidence and testimony relating to appellant's predecessor's (Nelson's) grandfather operations and relating to the events preceding the issuance of the permit. That evidence may be summarized, briefly, as follows:

Andrew G. Nelson started in the trucking business, under the name Nelson Warehouse & Express Company, in 1919. Between that time and 1935, when the Motor Carrier Act was passed, he hauled any and every kind of commodity, to any place, for anybody, for any price—all depending on what contracts he could get. He lost many of his customers in the early 1930's, when they went out of business because of the depression, but, in 1935, he still had some contracts and, most important, was still in the business of hauling anything, anywhere, for anybody who wanted his services. In fact, on August 24, 1934, he was granted a Certificate of Registration under the Code of Fair Competition for the Trucking Industry (established by the National Recovery

2. The Commission has often stated that, in construing the extent of authority granted in a grandfather permit, evidence of the grandfather operations and other events preceding the issuance of the permit is admissible only if the language of the permit is ambiguous. See, for example, *P. Saldutti & Son, Inc., Interpretation of Permit*, 63 M.C.C. 593 (1955).

Act), in which he was described as an "anywhere for hire Member of the Trucking Industry."[3]

When the Motor Carrier Act was passed in 1935, Nelson went to the local office of the Commission's Bureau of Motor Carriers to see what he had to do to comply with the new law. There, his case was handled by a Mr. Petritz (deceased at the time of the hearing). Nelson and Petritz discussed the type of permit Nelson should apply for and Petritz advised him as to the way in which his application should be filled out. On January 2, 1936, Nelson submitted his application for a permit to transport "store fixtures, miscellaneous merchandise and household furniture" in interstate commerce as a contract carrier by motor vehicle. This application, together with certain exhibits attached thereto, give the impression that, as of July 1, 1935, Nelson had only one contract—with the Walgreen Company—to transport store fixtures and miscellaneous merchandise and to transport the household goods of Walgreen's employees in connection with the opening, closing, and remodeling of Walgreen drug stores within a 600 mile radius of Chicago.

On November 11, 1936, in the Bureau of Motor Carriers' Office, Petritz gave Nelson a statement to read and to sign, in connection with his pending application. Like the application itself, the statement gives the impression that Nelson's only contract was with Walgreen. Nelson questioned some of the items on this statement which gave that impression, but was told by Petritz that he should sign the statement in order to get the kind of permit he wanted because it was only necessary to show that he had *one* contract (in order to qualify as a contract carrier as opposed

3. The fact of such registration, *per se*, constitutes evidence of *bona fide* operation to be considered in connection with the issuance of a grandfather permit under Section 209(a) of the Interstate Commerce Act, Part II, *supra*, p. 3.

to a common carrier) and it was only necessary to show that he had made *one* delivery in each of the states for which authorization was requested. Petritz told him that, after he received his permit, he would be free to add other contracts so as to continue the kind of business he had been doing. Therefore, Nelson did what he was told and signed the statement.

The truth of the matter was that, as of the middle of 1935, Walgreen was Nelson's blue ribbon account, but not his only account, for he was hauling various commodities for other shippers and less than one-half of his business involved the transportation of merchandise to drug stores or drug warehouses. Nelson had delivery tickets to show this, but Petritz had asked for only Walgreen tickets when he investigated Nelson's operations.

As in the case of many uncontested grandfather applications, Nelson's was handled informally, without a hearing. On February 14, 1938, the Commission issued what is commonly known as a compliance order, reciting that Nelson had applied for a permit "according to the specification" set forth in the appendix to the order and that Nelson "was in bona fide operation in such manner on July 1, 1935" and subsequently. The order then directs that, upon Nelson's compliance with certain formalities, a permit should be issued authorizing him to engage in interstate commerce as a contract carrier by motor vehicle "according to the specification" set forth in the appendix to the order. (Appendix F, *infra*, p. 61.) The specification contained in the appendix, referred to in the order to show (1) what kind of a permit Nelson had applied for, (2) the Commission's finding as to the nature of his operations as of July 1, 1935, and (3) the scope of operations to

be authorized in the permit to be issued, reads as follows (Appendix F, *infra*, p. 63):

> The business of applicant * * * in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:
>
> *New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores,[4]
>
> Between points and places in [10 Midwestern States].

Finally, on March 13, 1942, the Commission issued Nelson's grandfather permit, authorizing him to engage in transportation service in interstate or foreign commerce as specified below (Appendix A, *infra*, p. 34-35):

> *New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores, over irregular routes,
>
> Between points and places in [10 Midwestern states].

This, then, was the background of events that led up to the issuance of the grandfather permit whose interpretation was before the examiner in "Andrew G. Nelson, Inc. —Investigation of Operations".

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4. This is the first time in the grandfather application proceedings that the phrase "*stock* in trade of drug stores" appears. Actually, as noted above, Nelson had applied for authority to haul "store fixtures, *miscellaneous merchandise*, and household furniture." (Italics supplied.) In addition, the delivery tickets and schedule of minimum rates submitted with Nelson's application described commodities hauled only by the following categories:

Miscellaneous fixtures.
Miscellaneous fountain outfit.
Miscellaneous store fixtures.
Miscellaneous merchandise.
Miscellaneous equipment.
Miscellaneous household goods.

On September 22, 1954, the examiner issued his report (1) setting forth the pertinent language of the permit, (2) listing the commodities transported by appellant which were alleged to be in excess of the authority granted by the permit, (3) pointing out that these items do constitute part of the stock in trade of a drug store, but (4) interpreting the "commodity description 'stock in trade of drug stores' " as meaning the same thing as "drug stores' stock in trade" and (5) concluding that, under that interpretation, appellant could transport commodities only to drug stores or could transport only commodities "which are earmarked for eventual delivery to and sale in a drug store." (Appendix A, *infra*, pp. 34-38.) Accordingly, the examiner found that appellant had engaged in operations not within the scope of its operating authority, in violation of Section 209(a) of the Interstate Commerce Act, Part II, and recommended the issuance of a so-called cease and desist order. (Appendix A, *infra*, p. 41.) It should be noted that, in reaching his decision, the examiner held that the permit contained no patent ambiguity, so that (Appendix A, *infra*, p. 36):

> In considering the issue thus presented neither the operations of respondent prior to the "grandfather" date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance.

Nevertheless, he did bolster his interpretation by "an examination of the circumstances under which the permit was issued," referring only to the documentary evidence concerning the grandfather application and ignoring, completely, Nelson's testimony explaining the circumstances under which the application had been made. (Appendix, *infra*, pp. 38-39.) It should also be noted that the examiner made no attempt to interpret the commodity descriptions "*New and used store fixtures*" or "*new and used house-*

hold furniture" to determine whether or not some of the commodities allegedly hauled in violation of the terms of appellant's permit might have been authorized by those descriptions;[5] rather, he stated that the "*sole issue* [required] a determination of the extent of the authority granted by the commodity description '*stock* in trade of drug stores'". (Appendix A, *infra*, p. 36.) (First italics supplied.)

Appellant filed exceptions to the examiner's report on October 29, 1954 and the Commission, by division 5, filed its report on March 17, 1955, overruling the exceptions and adopting the examiner's report as its own "except as modified herein."[6] (Appendix A, *infra*, pp. 27-34.) The Commission stated that, with respect to that portion of the permit primarily in issue, namely, the phrase "*stock* in trade of drug stores", it agreed with the examiner that

> * * * to the extent respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drug store, such operations are in excess of its authority * * *

5. At the beginning of the hearing, the Bureau's counsel had stated that some of the items might have been properly transported under the new and used store fixtures category.

6. So far as we can see, the Commission's report modifies or supplements the examiner's in only three respects: (1) the term "*new and used store fixtures*" is defined, but by reference to two of the Commission's decisions and not with respect to the commodities whose transportation was in question in this case, (2) appellant's contention that some or all of the questioned commodities could be hauled as "new and used household goods" is rejected on the theory that any article which is part of the stock in trade of a mercantile establishment does not come within the meaning of "household goods," except as incident to the movement of such establishment from one location to another, and (3) the Commission, unlike the examiner, holds that the important question to be decided is what transportation was *intended* to be authorized by the language of the permit.

and directed the entry of an order "requiring respondent to cease and desist from the operations found to be unauthorized." (Appendix A, *infra*, pp. 33-34.) In reaching its conclusion the Commission held that the language of the permit was not ambiguous and, therefore, gave no consideration to events underlying its issuance. (Appendix A, *infra*, p. 30.)

On March 17, 1955, division 5 of the Commission issued an order requiring appellant, on or before May 2, 1955,[7] to cease and desist from the operations found in the Commission's report to be unauthorized and unlawful. (Appendix B, *infra*, p. 42.)

On December 12, 1955, appellant filed this action in the United States District Court for the Northern District of Illinois (Eastern Division) to set aside and to obtain an injunction against the operation of the Commission's cease and desist order. A hearing was held before a district court composed of Circuit Court of Appeals Judge Philip J. Finnegan and District Court Judges Walter J. LaBuy and Joseph Sam Perry, at which the entire record before the Commission (with certain minor exceptions) was introduced into evidence, certain documents concerning Nelson's grandfather application which were not a part of the Commission's record were introduced into evidence by agreement, and testimony and documents to support a showing of irreparable injury were introduced by appellant.

7. The effective date of the Commission's cease and desist order was voluntarily postponed, from time to time, by the Commission, so that it was finally fixed for August 1, 1956. On July 28, 1956, Justice Reed signed an order staying its operation pending this appeal.

THE QUESTIONS ARE SUBSTANTIAL.

I.

The Questions Regarding the Scope of the Commission's Power to Interpret Grandfather Permits and the Standards of Interpretation to Be Applied Are of Great Importance to a Large Segment of the Trucking Industry.

Appellant is one of a large number of motor carriers operating under the grandfather clause (Section 209 (a)) of the Interstate Commerce Act, Part II, *supra*, p. 3. *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, 211 (1952). In this case, appellant is fighting to preserve the "substantial parity" between its predecessor's pre-governmental-regulation operations and subsequent operations which this Court has said to be guaranteed by the grandfather clause. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22 (1942). This fight is made against the passage of time, the loss or destruction of records, the dimming of witness' memories, and, above all, changing policies of the Interstate Commerce Commission. Other carriers with grandfather rights have faced and will face the same challenges. The problems involved deserve this Court's attention.

Primarily involved in the first question presented is the Commission's interpretation of that portion of appellant's grandfather permit which authorizes the transportation of "*stock* in trade of drug stores". Appellant contends that this phrase, as used in its permit, was intended to be a commodity description—and nothing more, so that appellant is authorized to transport—without regard to the nature of consignor or consignee and without

regard to the use to which the commodities may eventually be put—such merchandise as is ordinarily found for sale in drug stores.

On the other hand, the Commission has ruled that implicit in the phrase "*stock* in trade of drug stores" is the limitation that no commodities may be transported—even though they are of the kind which ordinarily constitute part of a drug store's stock in trade—unless, at the time of transportation, they are intended to become part of the stock in trade of a drug store. (Appendix A, *infra*, pp. 33-34.) In so ruling, the Commission, in 1954, applied the so-called intended use test to interpret the language of a grandfather permit issued in 1942 and based on a 1938 compliance order. The Commission refused to consider evidence of appellant's predecessor's (Nelson's) grandfather operations as an aid to construction. (Appendix A, *infra*, p. 30.)

In reply, appellant maintains that (1) the Commission's interpretation of the bare words of its permit, unaided by consideration of the grandfather operations, is erroneous; (2) the Commission's interpretation is erroneous because it fails to consider and give importance to the nature of Nelson's grandfather operations, or, (3) if the Commission properly interpreted the phrase without considering grandfather operations, the language of the permit fails to give appellant all of the operating rights to which it is entitled under the grandfather clause.

Those, then, are the contentions of the parties—much simplified for the purposes of this statement. Their opposing views grow out of the following circumstances:

The entire history of the Commission's administration of the statute regulating motor carriers shows its increasing efforts to restrict the scope of grandfather permits so as to place holders of such permits more on a par with

the holders of new permits, whose terms and conditions, unlike those of grandfather permits, can be proscribed to suit the Commission's conception of its regulatory function.[8] For example, at first, the Commission ruled that it had no power to issue a permit restricting the class of shippers for whom a carrier might render service. *Longshore Carrier Application*, 2 M. C. C. 480 (1937). Later, when the Commission was searching for methods to narrow the scope of its authorizations, that ruling was reversed in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 475 (1939).[9] For another example, the Commission's early position was that any restrictions on an operating authority must be expressed in the permit, and not implied. *Coastal Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.* 48 M. C. C. 284 (1948); *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175, 188-189 (1949). For an example of the application of this approach in the interpretation of a commodity description see *Sanders Extension of Operations—Washington, D. C.*, 47 M. C. C. 210 (1947). Later, however, the Commission developed the intended use theory (applied in interpreting Appellant's permit) as a device for limit-

8. See concurring opinion of Chairman Eastman in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 475, 498-499 (1939), in which he warns that great care should be taken, in issuing grandfather permits, to accurately and closely specify and define the scope of the operating authority because there is less opportunity for control in grandfather cases.

9. The Commission's right to issue a permit restricting the class of shippers to be served (so long as the grandfather operations were so restricted) was upheld by this Court in *Noble* v. *United States*, 319 U. S. 88 (1943), but it is well established that no such restriction can be implied in a permit in which it is not explicit. *Vidas Contract Carrier Application*, 62 M. C. C. 106, 107 (1953). It should be noted that appellant believes that the Commission's application of the intended use test to the interpretation of its permit in this case is nothing more than an attempt to circumvent this prohibition and effectively impose the equivalent of a so-called Keystone restriction on its operations.

ing the scope of commodity descriptions.[10] Under this theory, what might on its face appear to be a generic description of authorized commodities by reference to places where they are found or sold or by reference to classes of persons who use them, becomes a restriction, by reference to ultimate destination or use, on the commodities, within such generic description, that may be hauled. The Commission itself has indicated that the intended use test is unsatisfactory and that it is often difficult to tell whether a particular phrase in a permit is to be taken in the former or the latter sense.[11] Indeed, the Commission, itself, has not attempted to apply the intended use test across the board. See *Vidas Contract Carrier Application*, 62 M. C. C. 106 (1953) and *Carroll Trucking Co., Interpretation of Certificate*, 62 M. C. C. 348 (1953).

On the whole, the federal courts have been a bulwark against the Commission's efforts to contract the scope of grandfather permits. In *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475 (1942), this Court refused to allow the Commission to issue a grandfather common carrier's certificate which would have (1) denied authority to transport certain commodities that had been carried before,

10. We believe that the earliest application of the intended use test, though not so labelled at the time, was in *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M. C. C. 567 (1949). With the precedent established, many other decisions applying the test soon followed. See, for example, *Builders Exp., Inc., Interpretation of Certificate*, 51 M. C. C. 103 (1949); *Greenberg—Investigation of Operation*, 52 M. C. C. 25 (1950); *Fleetlines, Inc.* v. *Osbourne Trucking Co.*, 52 M. C. C. 221 (1952); *Mural Trucking Service, Interpretation of Certificate*, 63 M. C. C. 47 (1954).

11. *Pierce Auto Freight Lines, Inc.* v. *Converse*, 54 M. C. C. 447, 453 (1953), affirmed (with the reservation that the court was not prepared to say that it would approve the intended use test under all circumstances), 109 F. Supp. 807 (N. D. Calif., 1953); *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M. C. C. 586, 587 (1954).

but not since, the grandfather date (June 1, 1935), even though of the same class as commodities which had been carried on that date and thereafter and (2) authorized the transportation only of those commodities which, both before and after the crucial date, had been carried in substantial amounts, with regularity.[12] And in *United States* v. *Seatrain Lines*, 329 U. S. 424 (1947), this Court established the cardinal principle on which appellant relies, viz., that the Commission has no more power to limit the scope of operating authority in a grandfather certificate (or permit, as in this case), once it has been granted, than it had to so limit the operating authority in granting the certificate in the first place—particularly when the Commission's purpose is to give effect to new policies formulated after the certificate was granted.[13]

In *Interstate Commerce Commission* v. *Ratner*, decided April 15, 1947 (N. D. Ill.),[14] the Court refused to grant the Commission's request for an injunction against the transportation of beer and empty beer containers from a brewery to a distributor where the commodities authorized in the permit were "*Such merchandise* as is dealt in by wholesale food business houses, and * * * *equipment*, *materials* and *supplies* used in the conduct of such business," inasmuch

12. This holding was in accord with the legislative history underlying the grandfather clause, which makes it clear that the important criterion was the nature of the carrier's business on the crucial date and not the particular operations, under individual contracts, in which he was engaged on that date. 79 Cong. Record, Part 5, p. 5654. See also *Alton R. Co.* v. *United States*, 315 U. S. 15 (1942).

13. Applied to the situation in this case, if the Commission's cease and desist order restricts Appellant's operating authority (1) more than the language of the permit, properly interpreted, warrants or (2) more than the grandfather operations, which should have been accurately reflected in the permit's language, warrant, it is unlawful.

14. Not officially reported, but reprinted in 6 Federal Carriers Cases, par. 80,415.

as the Court found that wholesale food business houses did deal in and distribute beer. In *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash., 1954), the Court set aside a Commission order which denied the carrier authority to transport materials used by his consignees as components of their manufactured products on the theory that the carrier's commodity description ("factory supplies") authorized the transportation only of supplies used in manufacturing the product. The Commission had, as in this case, refused to consider evidence of the carrier's grandfather operations. The Court held that the Commission (1) should have examined the grandfather operations and (2) was not entitled to interpret the commodity description in the light of a refinement in definition worked out after the permit had been issued[15] and remanded the case to the Commission.[16] Finally, in *Bird Trucking Co.* v. *United States*, decided September 26, 1955 (W. D. Wis.),[17] the Court set aside the Commission's interpretation of the commodity description "groceries", which had been arrived at (1) without due consideration of the evidence concerning the carrier's grandfather operations and (2) by reference to a refined definition of the term worked out by the Commission after the grandfather permit had been issued.

We submit that the decisions in the *Salvino* and *Bird*

15. Gradually, the Commission had broken down its commodity descriptions into (1) factory *materials* and (2) factory *supplies*.

16. On remand, the Commission decided that Salvino had carried both materials and supplies in the grandfather days and that "factory supplies" did not, when his permit was issued, have the subtle meaning since ascribed to it. Issuance of a new permit to cover both commodities was authorized. *Johnson Truck Service* v. *Salvino*, 63 M. C. C. 1 (1954). The Commission adopted the same approach, viz.: issuing a new permit to correct the inadequacy of a grandfather permit created solely by a refinement of definition subsequently adopted, in *Grifall Common Carrier Application*, 62 M. C. C. 763 (1954).

17. Not officially reported, but reprinted in 11 Federal Carriers Cases, par. 81,028.

cases are in conflict with the decision of the district court in this case[18] with respect to the scope of the Commission's power to interpret the language of grandfather permits by standards adopted after they were issued and without due consideration of the underlying grandfather operations. The questions thus raised have never received plenary consideration by this Court,[19] but are of obvious public import and should be resolved. It is particularly important that these questions be resolved as soon as possible because carriers whose permits are subjected to scrutiny under the intended use test have virtually no alternative but to present evidence of their grandfather operations[20]—evidence

18. In this field, of course, decisions by district courts of three judges are equivalent to decisions by the Courts of Appeal, since they may be reviewed only by this Court.

19. Several cases in which carriers attempted to construe the language of their permits or certificates to authorize operations larger in scope than their grandfather operations have been presented to the Court, but the questions raised by this appeal have never been resolved. See *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876 (Minn., 1953), motion to affirm granted, *per curiam*, 345 U. S. 980 (1953); *Callahan Road Imp. Co.* v. *United States*, 107 F. Supp. 184 (N. D. N. Y., 1952), affirmed, 345 U. S. 507 (1953), rehearing denied, 345 U. S. 978 (1953); *Pomprowitz* v. *United States*, 119 F. Supp. 824 (E. D. Wis., 1954), motion to affirm granted, *per curiam*, 348 U. S. 803 (1954), rehearing denied, 348 U. S. 889 (1954). Without going into the merits of the case at this time, we believe the statement, *supra*, pp. 7-10, shows that Nelson's grandfather operations were at least broad enough to authorize the transportation of the commodities in issue in this case. In addition, there is a substantial question as to whether or not the language of the permit accurately reflects what the Commission itself found, in its compliance order, to be the scope of the grandfather operations. (See pp. 9-10, *supra*.)

20. The Commission has ruled that the carrier has the burden of proving the nature and scope of his grandfather operations. *Dart Transit Co., Modification of Permit*, 49 M. C. C. 607, 609 (1949). Compare Section 7 (c) of the Administrative Procedure Act (49 U. S. C. 1952 ed. Sec. 1006 (c)), which provides that, except as otherwise provided by statute, the proponent of an order shall have the burden of proof.

which obviously becomes more difficult to acquire as time passes, memories are dimmed, and records are no longer available.

II AND III.

It Is Equally Important That, in Arriving at Its Decisions, the Commission Should Respect the Requirements of the Administrative Procedure Act.

The Commission's report and order are as defective procedurally as they are substantively.

First, if, as we believe, appellant's grandfather operations are important in considering whether or not it has hauled commodities not authorized in its permit, the Commission's report fails to make findings and conclusions with respect to those operations, with reasons and bases therefor, as required by Section 8 (b) of the Administrative Procedure Act (*supra*, pp. 3-4) and by this Court (see *Howard Hall Co.* v. *United States*, 315 U. S. 495 (1942)). Although the examiner's report, adopted by the Commission, does mention the grandfather operations, as a makeweight, it does not at all consider (even if only to reject) the effect of Nelson's testimony on the probative value of the documentary evidence before him.[21] (Appendix A, *infra*, pp. 38-39.) Even if it should be assumed that the Commisison did consider (and accept as conclusive) the documentary evidence concerning the grandfather application, unexplained by Nelson's testimony, appellant claims that this action is unsupported by substantial evidence, as required by Section 10 (e) of the Administrative Procedure Act (*supra*, p. 4). Since *Universal Camera Corp.* v. *Labor*

21. There is some doubt as to whether or not the Commission intended to adopt this portion of the examiner's report, since his report was adopted only insofar as not modified in the Commission's report and the latter rejects all consideration of grandfather evidence. (Appendix A, *infra*, pp. 30, 33.)

Board, 340 U. S. 474 (1951), it has not been doubted that this section authorizes courts reviewing administrative decisions to consider evidence in the record contradictory to that relied on by the agencies, in determining the reasonableness and fairness of those decisions.

Second, the Commission failed to make findings and conclusions with respect to whether or not any or all of the commodities alleged to have been transported without authority might have been rightfully transported under those portions of appellant's permit which authorize the transportation of "*new and used store fixtures*" or "*new and used household goods.*" Even the Bureau's counsel thought that some of the items hauled might come within the former commodity description; and yet the examiner ignores the problem completely and the Commission merely refers to the fact that these commodity descriptions have been defined in other Commission decisions without determining whether or not any of the commodities in question fall within those categories, as so defined.[22] (Appendix A, *infra*, pp. 30-31.) For example, one of the categories of items whose transportation was challenged in the Commission's January 21, 1954, order initiating the investigation

22. Of course, the fact that these commodity descriptions have been defined by the Commission in other situations does not necessarily mean that the same definitions apply to appellant's permit, which was issued *before* those refined definitions were developed by the Commission in the decisions cited. The only important question is what was intended by the use of the commodity descriptions "*New and used store fixtures*" and "*new and used household goods*" in this appellant's permit. See *Petroleum Carrier Corp.* v. *Black*, 51 M. C. C. 717 (1950); *Bison Freight Lines* v. *Northwest Dispatch, Inc.*, 60 M. C. C. 506 (1954); and *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash., 1954). The definition of household goods referred to is narrower in scope than the Commission's published definition, in force when appellant's permit was issued and is, therefore, wholly inappropriate. See *Practices of Motor Carriers of Household Goods*, 17 M. C. C. 467 (1939).

wax, kitchen, storage, or wardrobe cabinets or lockers,[23] which would appear to be either store fixtures or household goods, but there was no evidence to show the consignee's business or the circumstances under which they were hauled. Therefore, even if the Commission had seen fit to make findings and conclusions with respect to the propriety of transporting these items, it would have had no support in the record and it is elementary that the proponent of the cease and desist order has the burden of proof. Administrative Procedure Act, Sec. 7 (c).

Third, and in some ways, most important, the cease and desist order is arbitrary, capricious, and void for vagueness and indefiniteness. At issue was appellant's right to transport certain specified commodities. Decision of that issue necessarily involved a determination of the scope of appellant's operating authority. The examiner determined that scope, though only so far as the phrase "*stock* in trade of drug stores" was concerned, by applying the intended use test and concluded that appellant should be ordered to cease operations not authorized by its permit. To this, the Commission's report adds no more than a vague reference to the Commission's current definitions of new and used store fixtures and new and used household furniture. Finally, the cease and desist order itself merely orders appellant to abstain from the operations found in its report (which incorporated the examiner's report) to be unauthorized and unlawful. (Appendix B, *infra*, p. 42.) An order of this sort is like a general decree to stop violating the law. It could be interpreted as ordering appellant to cease transporting those commodities specifically at issue; it could be interpreted as ordering appellant to respect the intended use test with respect to all commodities coming within the "*stock* in trade of drug stores" category; or, perhaps it was meant to order some sort of compliance;

23. Neither the examiner's nor the Commission's report refers to these items.

with respect to the hauling of store fixtures and household goods, though it is surely impossible to obtain any guide to appellant's conduct under these commodity descriptions from the report and order. At least in *Dart Transit Co., Investigation of Operations*, 54 M. C. C. 429 (1952), affirmed 110 F. Supp. 876 (Minn., 1953), motion to affirm granted, *per curiam*, 345 U. S. 980 (1953), the cease and desist order described the commodities not to be hauled and gave some indication of the scope of the order.

If appellant is to be subjected to the possibility of having its permit revoked under Sec. 212 (a) or of having criminal sanctions imposed under Sec. 222 (a) of the Interstate Commerce Act, Part II (49 U. S. C. 1952 ed., Secs. 312 and 322) for non-compliance with this order, it should at least be reasonably apprised by the order of what it can and cannot haul.

Conclusion.

There is little doubt that the Commission's application of the intended use test to the interpretation of "*stock* in trade of drug stores" in appellant's permit, if allowed to stand, will put it out of business.[24] Therefore, a determination of the issues involved is obviously important to appellant. But it is also important that other holders of grandfather permits and, indeed, the Commission (in its administration of the Interstate Commerce Act) should know the scope of the Commission's power to interpret grandfather

24. Appellant's president testified before the district court that its gross income from October 1, 1954 to December 31, 1955, was $952,881, 95% of which was derived from transporting commodities commonly held for sale by drug stores, but which, at the time of transportation, were not known to be destined for ultimate sale in a drug store. How, for example, could appellant be expected to require shippers of candy to earmark each box for sale in a drug store, rather than in a candy store or department store or by a sidewalk vendor, and still retain their business?

permits, the proper canons of interpretation to be applied, and the procedural requirements for effectuating its interpretations.

For these reasons, the questions raised in this appeal are substantial and deserve plenary consideration by this Court, with an opportunity for briefs and a hearing on the merits.

Respectfully submitted,

PAUL E. BLANCHARD,
VICTOR E. LEWIS,
EDWARD W. ROTHE,
Counsel for Appellant.

August, 1956.

APPENDIX A.

INTERSTATE COMMERCE COMMISSION.

No. MC-C-1610.

ANDREW G. NELSON, INC.—INVESTIGATION OF OPERATIONS.

Submitted December 13, 1954. *Decided March 17, 1955.*

Respondent found to be engaged in transportation not authorized by its permit and not to be in compliance with the requirements of section 209(a) of the Interstate Commerce Act. Cease and desist order entered.

Paul E. Blanchard and *Milton E. Diehl* for respondent.

James A. Murray, Hugh E. Lillie, James Y. Piper, and *Thomas J. Delaney* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Eugene L. Cohn, Bernard G. Colby, Ovid Crouch, Claude G. Metzler, Joseph M. Scanlon, Carl L. Steiner, and *Glenn W. Stephens* for interveners in support of the investigation.

REPORT OF THE COMMISSION.

DIVISION 5, COMMISSIONERS CROSS, TUGGLE, AND HUTCHINSON.

BY DIVISION 5:

Exceptions were filed by respondent to the order recommended by the examiner, and certain interveners and the Bureau of Inquiry and Compliance, Interstate Commerce Commission, hereinafter referred to as the Bureau, replied.

Respondent's exceptions are nine in number. It excepts: (1) to the alleged fragmentary and incomplete statements of fact in the report of the examiner, specifically as regards those historical facts relating to the original "grandfather" application and the so-called "compliance order" which constituted a step in the informal processing of the application of respondent's predecessor-in-interest culminating in the issuance of the assailed permit; this exception is premised on a conclusion that the terms of the permit are ambiguous; (2) to the examiner's statement of the issue to be "a determination of the extent of the authority granted by the commodity description '*stock* in trade of drug stores' ", it being respondent's position that the sole issue relates to whether the permit contains a so-called "Keystone" restriction, limiting the persons whom respondent may serve to a certain class of shippers; (3) to the alleged inconsistency between the examiner's finding that "*stock* in trade of drug stores relates to stock kept for sale purposes by one who operates a drug store, and the position of the Bureau that the intended use test is applicable here, it being respondent's contention that if the examiner's interpretation is correct the permit would allow only the movement from one shelf to another in the same store rather than a movement which is unrestricted so long as it is earmarked for eventual delivery to, and sale in a drug store as the Bureau urges; (4) to the examiner's refusal to accept respondent's interpretation of the term "*stock* in trade of drug stores" as meaning "commodities described as stock in trade of drug stores", it being respondent's contention that such refusal is equally critical of the previously noted compliance order, entered herein; respondent argues that the compliance order must be examined to determine whether or not the permit effectuates that order; (5) to the examiner's selection of

the particular dictionary definitions of the word "of", in his interpretation of the term "stock in trade *of* drug stores," claiming that his choice is designed to suit the objective of the Bureau; it argues that there are many other definitions of the word "of" which make equally as much sense as the one adopted by the examiner connoting possession and ownership; (6) to the examiner's alleged failure to point out that this permit was issued subsequent to the determination by this Commission that a permit may be restricted to a certain class of shippers, in the face of which the permit in question was not so limited, it being argued that the "Keystone" restriction could have been inserted in the permit but was not, and cannot now be read into the authority; it urges further that the Commission abandoned the intended use test in the report in *Vidas Contract Carrier Application*, 62 M. C. C. 106, which decision, it alleges, is controlling here; (7) to the alleged failure of the examiner to point out that respondent's permit embraces authority to transport "new and used household goods", the scope of which has already been spelled out and defined by the Commission, and that under such definition respondent has authority to transport almost every article, from every consignor to every consignee, named in the investigation order, regardless of the scope of consignee or consignor coverage included in the term "*stock* in trade of drug stores." It is respondent's position that the Commission's definition of "household goods" in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467 authorizes it to transport "*property of stores* * * * when *part of the stock, equipment or supply* of such stores * * *", without restriction of any kind; (8) to the inclusion in the report of the discussion of our power to revoke a permit and the procedure by which such action is to be accomplished, it being contended that such discussion has no relevancy here; and

(9) to the examiner's reference to the number of opposing motor carriers and associations thereof, and rail carriers, charging this was an attempt unduly to inflate the degree of opposition to respondent; it claims that much of the opposition was "nominal" and that relatively few motor carriers were serious in their support of the Bureau.

In reply certain interveners support the findings and conclusions of the examiner except that they would place an even more limited interpretation on the term "stock in trade." They urge now, as they did at the hearing, that under trade usage and practice, such term does not include all commodities that a drug store may have for sale purposes. In particular they would exclude such commodities as storage batteries, cabinets, lockers, canned vegetables, pickles and similar articles, which they assert are known in the trade as "drug sundries" rather than "stock in trade". The Bureau and certain other interveners support the findings and conclusions of the examiner and urge that they be sustained.

We agree with the contention of the parties and the examiner's conclusion that there is no such patent ambiguity in the permit as to warrant going back of it and giving consideration to events prior to its issuance. This obviates the necessity for consideration of respondent's first and fourth exceptions which are premised on such events.

As to the second and seventh exceptions, we are of the opinion that the examiner's statement and discussion of the issue is sound as regards the phrase "*stock* in trade of drug stores". Involved also, however, is a determination of the extent of authority granted by the terms "*new and used store fixtures*" and "new and used household goods". It appears that examiner's omission of a statement regarding these terms stems from the fact that at

the hearing respondent did not appear seriously to contend that such terms authorized it to conduct the operations to which the investigation order made reference. Even on exceptions no question is raised as to the meaning of the term "*new and used store fixtures*", which is adequately defined in *Shelinsky Common Carrier Applicaton*, 52 M. C. C. 349, at 359, where division 5 said:

> "In our opinion, a motor carrier authorized to transport 'store fixtures' is limited to such items as showcases, counters, tables, floor cabinets, wall cases and other items of similar utility."

and in *Mural Trucking Service Interpretation of Certificate*, ... M. C. C., ..., decided November 15, 1954, where, in interpreting the term "store fixtures and store equipment", division 5 stated:

> "Petitioners' operations, although not actually limited to the transportation of shipments moving to stores * * *, are, nevertheless, strictly limited to the transportation of commodities which at the time of the transportation are intended for such use."

Respondent's contention with respect to the meaning of "household goods" is totally without merit. Any article which is a part of the stock in trade of a mercantile establishment does not for that reason come within the meaning of "household goods", except as an incident of the movement of such establishment from one location to another. See *Barnett Extension of Operations—Furniture*, 44 M. C. C. 587, *Shapiro Extension—Shuffleboards*, 49 M. C. C. 634, and *North American Van Lines, Inc., Extension—New Furniture*, 49 M. C. C. 368.

As to the third exception, we do not agree that an inconsistency exists between the intended use test and the examiner's statement that "*stock* in trade of drug stores" means stock kept for sale purposes by one who op-

erates a drug store. The definition is valid and points, in our opinion, to the obvious equivalent of the description in the permit, which is "drug stores' *stock* in trade", as the examiner concluded. The important determination here, as in all such inquiries, is what transportation was intended to be authorized by this language of the permit. In *C & H Transp. Co. Inc., Interpretation of Certificate*, 62 M. C. C. 586, division 5 concluded that authority to transport "contractors' equipment and supplies" authorizes the transportation of all forms of equipment and supplies which are at the time of movement intended for use by a contractor, and further that when the controlling use is established, the commodity may be transported for or to anyone, and the identity of the shipper or consignee is not important except as it may tend to establish or confirm the intended use. The similarity between the phrase there interpreted and "*stock* in trade of drug stores" or its equivalent, "drug stores' *stock* in trade", is readily apparent, and no good reason has been advanced for a conclusion here, different from that in the case just cited.

The fifth exception raises no question not disposed of in our discussion of the third and need not be further considered.

The sixth, eighth, and ninth exceptions are without merit. As to the sixth, no attempt has been made to read into respondent's permit a "Keystone" restriction. The commodity limitation in its permit does not limit the class or type of persons with whom it may contract as would a "Keystone" restriction. Further, respondent's argument that the intended use test has been abandoned by the Commission is fallacious. True it was found inapplicable in the *Vidas* case, *supra*, but it remains valid and has been found applicable in proceedings more recent than *Vidas*. See *C & H Transp. Co. Inc.*, *supra*, and *Mural*

Trucking Service Interpretation of Certificates, supra. As to the eighth, respondent, itself, in its brief raised certain questions as to the procedure by which a permit might be revoked, and in his report the examiner clarified the matter. Moreover, the order instituting this investigation specified that this action was taken under sections 204(c) and 212(a) of the Interstate Commerce Act, the latter section dealing, among other things, with our power to revoke or suspend operating authorities. As to the ninth, suffice it to point out that the examiner correctly indicated the support of interveners which the Bureau has in this proceeding, and that of the "nominal" opposition to which respondent refers, briefs and replies to respondent's exceptions herein were filed on behalf of 17 motor carriers and an association of motor carriers.

We are unable to agree with the contention of certain interveners that "stock in trade" has a more limited meaning than that advanced by the examiner, although we do agree that cognizance of trade usages may be taken in determining proper construction of terms used in authorities. In any event, it is of no moment in the instant proceeding as the conclusion does not depend on such determination.

We have given full consideration to respondent's exceptions and the replies thereto and find that except as modified herein the examiner has adequately stated the facts and conclusions on the issues in the report hereinafter set forth which accompanied his recommended order. With respect to that portion of the permit primarily in issue, namely, the phrase reading "*stock* in trade of drug stores", we agree with the conclusion of the examiner that to the extent respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade

of a drug store, such operations are in excess of its authority and are in violation of section 209 of the act and should be discontinued. In the circumstances we adopt his report and findings as our own. An appropriate order requiring respondent to cease and desist from the operations found to be unauthorized will be entered.

REPORT OF THE EXAMINER.

By order entered January 21, 1954, the Commission, division 5, instituted this investigation with a view to determining whether Andrew G. Nelson, Inc., hereinafter called respondent, is and has been engaged in the transportation of commodities not within the scope of its operating authority, in violation of section 209(a) of the Interstate Commerce Act, or of any requirement, restriction, term, or condition of its permit. The order further provided for the issuance of such orders and the taking of such other action as the facts and circumstances may appear to warrant, and that upon the failure of respondent to comply with any order issued herein, to conduct a further proceeding to determine whether the respondent's permit should be suspended or revoked.

The matter was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held in May 1954, at Chicago, Ill. The Bureau of Inquiry and Compliance, of the Commission, hereinafter called the bureau, was joined in its support of the investigation by 19 motor carriers, 3 associations of motor carriers, and the class I rail carriers in western territory.

The respondent operates under the authority of permit No. MC-1194, which was issued on March 13, 1942 pursuant to a "grandfather" application filed on January 2, 1936. The permit was issued in the name of Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., Chi-

cago, Ill., and provided for transportation service in interstate or foreign commerce as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores, over irregular routes.

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

Subsequently, by order dated March 12, 1951, the Commission in No. MC-FC 53070 authorized transfer of the aforesaid operating rights to Andrew G. Nelson, Inc., and the permit was transferred by order dated June 18, 1951. The sole stockholder was Andrew G. Nelson, the original applicant, and on April 1, 1953, he sold his stock to the present operators.

The bureau introduced evidence showing that in 1953 during the period July 31 to December 16, the respondent transported in interstate commerce the following commodities from consignors, *none of whom were drug stores,* to the consignees whose business is as indicated: Numerous and varied canned or packaged grocery items to grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of record; candy to a wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile batteries to a general merchandising company. It was also shown by the bureau that in the period from April 24, 1951 to April 1, 1953, the respondent entered into 14 contracts with shippers, and that 32 contracts were signed by the new stockholders in the first 8 months of their management.

Although some of the commodities transported by re-

spondent might be questioned as to whether they constitute part of the stock in trade of a drug store, the bureau does not raise such question. Instead, it contends that the authority to transport "*stock* in trade of drug stores" permits only the transportation of commodities which at the time are part of the stock in trade of a drug store, or are intended for eventual use as the stock in trade of a drug store. Thus, the bureau's ultimate contention is that the respondent's permit restricts transportation to authorized commodities moving to or from a drug store, or to or from a warehouse or other repository when such commodities are earmarked for eventual use as the stock in trade of a drug store.

The respondent contends that the description "*stock* in trade of drug stores" permits transportation from and to any consignor and consignee, provided of course that the commodities transported are the same as those sold in drug stores. It is asserted by respondent that the permit does not include any language restricting the transportation to a particular or specified class of consignees.

The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description "*stock* in trade of drug stores." None of the parties claim that such description is patently ambiguous, and ambiguity may not be assumed merely from the fact that the bureau and interveners are in disagreement with respondent as to the meaning of the description. In considering the issue thus presented neither the operations of respondent prior to the "grandfather" date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance.

The principal contention on behalf of the respondent with respect to the term "*stock* in trade of drug stores" is that such description unequivocally grants authority

to transport "commodities described as stock in trade of drug stores". It is then argued that the latter description is obviously unrestricted as to the class of consignees who may be served by respondent. This argument is completely without merit because it is based on the false premise that the respondent's permit authorizes the transportation of "commodities described as stock in trade of drug stores". As stated before, the issue presented herein is explicit, namely, a necessary interpretation of the commodity description "*stock* in trade of drug stores". Any arguments as to the authority granted by the description "commodities described as stock in trade of drug stores", clearly change the basic issue and are irrelevant.

An interpretation of the commodity description "*stock* in trade of drug stores", immediately and obviously presents the initial question as to the purpose of the Commission in emphasizing the word stock by underscoring. It will be noted that the other commodity descriptions in the permit, namely, "*New and used store fixtures, new and used household goods*" are completely underscored. Therefore, the underscoring of only the word "stock" in the description "*stock* in trade of drug stores" was intentional in order to segregate and emphasize such word within the disputed description. The only possible meaning that can be attached to such segregation and emphasis is that the transportation of "stock", as further defined in the commodity description, is authorized by the permit granted to respondent. The word "stock" in a mercantile sense simply means goods possessed by a merchant or manufacturer. Such goods include articles either for sale or for the possessor's own use. The following words in the description are "in trade" and they modify the word "*stock*" by restricting it to mean only those goods which are kept by a merchant or manufacturer for sale purposes. The subsequent words in the description are "of drug stores" and they further

modify and explain the preceding words "*stock* in trade" by limiting them to a particular class of merchant, namely, one who operates a drug store.

The correctness of the above interpretation is apparent if attention is directed specifically to the word "of" in the disputed commodity description. Among the numerous definitions applicable to "of", only that connoting possession or ownership has any sensible meaning as used in respondent's permit. In other words, the commodity description under consideration is merely a different but equally effective manner of stating "drug stores' *stock* in trade". The limitation as thus imposed by the commodity description is not restricted to deliveries to drug stores but, as stated by the bureau, also includes goods which are earmarked for eventual delivery to and sale in a drug store. Accordingly, respondent's past and continued transportation in excess of that granted by its permit, as described herein, is in violation of section 209(a) of the act and should be discontinued immediately.

Although there is no such patent ambiguity in the permit as to warrant consideration of events prior to its issuance to Andrew G. Nelson, the correctness of the interpretation set forth hereinbefore is borne out by an examination of the circumstances under which the permit was issued. A hearing was not held in connection with the "grandfather" application but instead the Commission relied on a signed statement from Nelson, accompanied by delivery receipts showing interstate contract movements for Walgreen Company in the period June 27, 1934-September 21, 1935. The Walgreen Company operates a chain of drug stores throughout the territory respondent is authorized to serve. The statement signed by Nelson contained the following unqualified assertions:

"That he is an interstate contract carrier of property

for the Walgreen Company and for it alone. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodeling, and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock."

These declarations by Nelson in a signed statement show that he desired only to continue serving retail drug stores of one company. However, the terms of the permit go beyond Nelson's request to the extent that there is no restriction other than territorial in the permit with respect to the transportation of new and used store fixtures and household goods, and the transportation of the stock in trade of drug stores is not limited to only one chain of drug stores as consignees or ultimate users. With the exceptions noted, the permit complies with the transportation that Nelson claimed he was engaged in on the "grandfather" date, and which he wished to continue.

The Commission's power to revoke a permit is circumscribed by express provisions in section 212(a), and is adequately discussed in *Florence Lane-Revocation of Permit*, 52 M. C. C. 427. In that proceeding, the Commission, division 5, said: "* * * a revocation of permit may be effected only after a notice and hearing and then only for wilful failure to comply with an order issued after a notice and hearing under section 204(c)." Thus two "notices and hearings" are required. Notice and hearing which is the very essence of due process means an opportunity to be heard. In *Dohany* v. *Rogers*, 281 U. S. 362, 369, it is said that the requirements of due process are satisfied so far as procedure is concerned if the person "has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be

affected by it." Section 5 of the Administrative Procedure Act provides, in part:

> (a) NOTICE.—* * * In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. * * *
>
> (b) PROCEDURE.—The agency shall afford all interested parties *opportunity for (1) the submission and consideration of facts.* * * * (Emphasis supplied.)

Rule 43 of the General Rules of Practice Before the Commission, reads as follows:

> An order instituting an investigation will be served by the Commission upon respondents. If, within a time period stated in that order, *a respondent fails to comply with any requirement specified therein, respondent shall be deemed in default and to have waived any further hearing.* Thereafter the investigation may be decided without further proceedings. (Emphasis supplied.)

It is apparent that the statutory requirements of notice and hearing are satisfied if the parties are given a reasonable notice and afforded a reasonable opportunity to be heard, and that in proceedings initiated by an investigation such as here, the Commission may require a responsive pleading respecting the desire of a respondent to an oral hearing, and, in the event respondent fails to comply with this requirement, respondent shall be deemed in default and to have waived its right to such oral hearing. The evidence indicates that respondent will appear at a second hearing in the event of default of the order under section 204(c) entered herein. Nevertheless, in the circumstances here present it is appropriate to call upon respondent to inform the Commission, in writing, if it desires an oral hearing (above mentioned second hearing).

The examiner finds that respondent has been and is engaged in the conduct of operations not within the scope of its operating authority, in violation of section 209(a) of the act, and that an order should be entered requiring respondent, within 60 days of the effective date of the order, to discontinue such unlawful operations and thereafter maintain only the operations authorized by its permit and to comply with the provisions of section 209(a) of the act, and within 10 days thereafter inform the Commission in a written statement under oath whether or not compliance has been made therewith.

The examiner further finds that in the event respondent fails, within 60 days of the effective date of the order, to operate only as authorized by its permit and to comply with section 209(a) of the act, it should be required to inform the Commission, in writing, within the time above specified for informing the Commission regarding compliance or noncompliance, if an oral hearing is desired at which to present further evidence as to why the permit should not be revoked, failing in which respondent shall be deemed in default and to have waived such oral hearing and the matter shall be taken under consideration on the facts then of record with a view to the entry of an order revoking its permit if it should be determined that such action is warranted.

APPENDIX B.

ORDER.

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 17th day of March, A. D. 1955.

No. MC-C-1610.

ANDREW G. NELSON, INC.,—INVESTIGATION OF OPERATIONS.

Investigation of the matters and things involved in this proceeding having been made, and the said division, on the date hereof, having made and filed its report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof, and said proceeding having been duly submitted:

It is ordered, That respondent Andrew G. Nelson, Inc., be, and it is hereby, notified and required to cease and desist on or before May 2, 1955, and thereafter to abstain and refrain, unless and until appropriate authority therefor is obtained, from the operations in interstate or foreign commerce found in said report to be unauthorized and unlawful.

By the Commission, division 5.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX C.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Andrew G. Nelson, Inc., *Plaintiff,*

vs.

United States of America and Interstate Commerce Commission, *Defendants,*

and

Advance Transportation Co., Inc., et al., *Intervening Defendants.*

Civil Action No. 55-C-2302.

MEMORANDUM OPINION.

Before FINNEGAN, *Circuit Judge*, and LA BUY and PERRY, *District Judges.*

FINNEGAN, *Circuit Judge.* Andrew G. Nelson, Inc., plaintiff, invoked a statutory three-judge district court (28 U. S. C. § 1336, § 2284, § 2325) to enjoin and annul a cease and desist order of the Interstate Commerce Commission, dated March 3, 1955, in Docket No. MC-C-1610, reported in 63 M. C. C. 407 (1955). The challenged order is a culmination of hearings initiated by the Commission under § 204(c) and § 212(a) of the Interstate Commerce Act,[1] to investigate plaintiff's operations under its permit, issued June 18,

1951, authorizing the transportation, over irregular routes of: "(N)ew and used store fixtures, new and used household goods and stock in trade of drugstores." By its own initial order the Commission made this corporate plaintiff a respondent in those proceedings instituted for the purpose of determining whether Andrew G. Nelson, Inc., is and was engaged in the transportation of commodities outside the scope of its operating authority, in violation of § 209(a) of the Act,[2] or "of any requirement, restriction, term, or condition of * * * (its) permit * * *" From the record made before the Commission it is established that the plaintiff corporation was represented by several counsel during an adversary proceeding before an examiner, at which other attorneys appeared on behalf of several intervenors.

Earlier, in March, 1942, under No. MC 1194, plaintiff's predecessor, Andrew G. Nelson, an individual, had been authorized by the Commission to conduct business as a contract carrier by motor vehicle the commodities mentioned and already quoted above in connection with the June, 1951, permit. Nelson's 1942 permit (No. MC 1194) was issued under the "grandfather" clause in the first proviso of § 209(a)(1), Part II, of the Act. Later, sometime in 1951, Nelson incorporated and with Commission approval his permit was transferred to the corporate plaintiff before us.

Plaintiff participated in the challenged administrative proceedings held by the Commission during which the Bureau of Inquiry and Compliance, Interstate Commerce Commission, introduced evidence establishing that during a period in 1953 this carrier transported in interstate commerce, commodities from consignors, none of whom were drugstores, to consignees "whose business is as indicated. Numerous and varied canned or packaged grocery items to

grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of record; candy to a candy wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile batteries to a general merchandising company * * *." 63 M. C. C. 407, 412.

Proceeding before us by way of a complaint for a declaratory judgment, plaintiff asks, in substance, that we review the Commission's order by measuring it with constitutional yardsticks. No problem of exhausting administrative remedies is involved. Plaintiff insists that by its order, now in issue, the Commission whittled down the operating permit originally issued under the "grandfather clause". But the Commission was investigating plaintiff's compliance or non-compliance with permit No. MC 1194, as is disclosed *inter alia* by this statement reported by the Examiner:

> "The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description '*stock* in trade of drugstores.' None of the parties claim that such description is patently ambiguous, and ambiguity may not be assumed merely from the fact that the Bureau and interveners are in disagreement with respondent as to the meaning of the description. In considering the issue thus presented neither the operations of respondent prior to the 'grandfather' date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance."

When the matter moved up to the level of Division 5 it was pointed out (63 M. C. C. 407, 409): "(W)e agree with the contention of the parties and the examiner's conclusions that there is no such patent ambiguity in the permit as to warrant our going back of it and giving consideration to

events prior to its issue." We think the Commission acted within its statutory power and for that reason refuse to disturb the challenged order.

Having examined the pleadings, exhibits, record made before the Commission, after hearing oral arguments of counsel for both sides, receiving evidence on the matter of damages, and being fully advised in the premises, we find and conclude as follows:

Findings of Fact.

1. Plaintiff, Andrew G. Nelson, Inc., an Illinois corporation, operates as a motor contract carrier in ten North Central States under authority of Permit No. MC 1194, which was issued on March 13, 1942, by the Interstate Commerce Commission (hereinafter called "the Commission") to plaintiff's predecessor in interest (Andrew G. Nelson, as individual), and was authorized to be transferred to plaintiff by order dated March 12, 1951. A new permit was issued to plaintiff on June 18, 1951.

2. The aforesaid permits authorized plaintiff and its predecessor to transport *new and used store fixtures, new and used household goods*, and *stock* in trade of drug stores.

3. Pursuant to said application, the Interstate Commerce Commission in its Docket MC-1194, under date of February 14, 1938, issued its so-called compliance order reciting in part as follows:

> "After due investigation:
>
> "It appearing, That applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, including due service, made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or

predecessor in interest was in *bona fide* operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding;"

The specification set forth on the reverse side of said compliance order and referred to in the foregoing quotation of said order reads as follows:

"The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores.

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin."

The foregoing finding of the Commission made in said compliance order of February 14, 1938, has never been changed and remains in effect.

4. The Interstate Commerce Commission issued to Andrew G. Nelson under date of March 13, 1942, a permit to engage in interstate or foreign commerce as a contract carrier by motor vehicle, a portion of which permit reads as follows:

"IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores, over irregular routes,

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin."

5. That the aforesaid permit dated March 13, 1942, was transferred to plaintiff in the manner and form required

by law, and the Interstate Commerce Commission on June 18, 1951, reissued such permit to plaintiff making no change therein except the substitution of plaintiff's name for the name of the original holder.

6. Plaintiff is and has been since 1951 engaged in the transportation of commodities in Interstate Commerce as a contract carrier, pursuant to authority granted by said permit.

7. By order entered January 21, 1954, the Commission, Division 5, instituted an investigation proceeding in its Docket No. MC-C-1610 with a view to determining whether Andrew G. Nelson, Inc., is and has been engaged in the transportation of commodities not within the scope of its operating authority, in violation of section 209(a)(1) of the Interstate Commerce Act (49 USC § 309(a)(1)), or of any requirement, restriction, term, or condition of its permit. The order further provided for the issuance of such orders and the taking of such other action as the facts and circumstances may appear to warrant.

8. A hearing was held by a hearing examiner of the Commission in May, 1954, at Chicago, Illinois.

9. The Bureau of Inquiry and Compliance of the Commission was joined in its support of the investigation by 19 motor carriers, 3 associations of motor carriers, and the Class I rail carriers in western territory.

10. During the period July 31, 1953, to December 7, 1953, the respondent transported in interstate commerce the following commodities from consignors, none of whom were drug stores, to the consignees whose business is as indicated: Numerous and varied canned or packaged grocery items to grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of rec-

ord; candy to a wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile batteries to a general merchandising company.

11. Plaintiff did not deny that it had engaged in the aforesaid transportation, but contended that the description "*stock* in trade of drug stores" permits transportation from and to any consignor and consignee, provided that the commodities transported are the same as those sold in drug stores.

12. The hearing examiner held that this argument was without merit because it was based on the false premise that the plaintiff's permit authorizes the transportation of "commodities described as stock in trade of drug stores." The hearing examiner further found that the commodity description under consideration is merely a different but equally effective manner of stating "drugstores" *stock* in trade"; that the limitations as thus imposed by the commodity description is not restricted to deliveries to drugstores but also includes goods which are earmarked for eventual delivery to and sale in a drugstore; and that, accordingly, plaintiff's past and continued transportation in excess of that granted by its permit, as described in Finding of Fact 6, is in violation of section 209(a)(1) of the act and should be discontinued immediately.

13. The hearing examiner further held that there is no such patent ambiguity in the commodity description "*stock* in trade of drugstores" in the permit as to warrant consideration of events prior to issuance to plaintiff's predecessor.

14. The examiner served his recommended report and order, proposing the issuance of a cease and desist order, on September 22, 1954.

15. Plaintiff filed exceptions to the examiner's recommended report and order on October 29, 1954.

16. The Commission, Division 5, issued its report (63 M. C. C. 407) on March 17, 1955, in which it found that, except as modified in its report, the examiner had adequately stated the facts and the issues, and it adopted his report and findings except as modified.

17. In ruling against plaintiff's exceptions and upholding the hearing examiner, Division 5, found that there is no such patent ambiguity in the permit as to warrant giving consideration to events prior to its issuance; that the examiner's statement and discussion of the issue is sound as regards the phrase "*stock* in trade of drugstores"; that the term "*new and used store fixtures*" is adequately defined in *Shelinsky Common Carrier Application*, 52 M. C. C. 349, at 359, and in *Mural Trucking Service Interpretation of Certificate*, 63 M. C. C. 47; that plaintiff's contention with respect to the meaning of "*household goods*" is totally without merit; that any article which is a part of the stock in trade of a mercantile establishment does not for that reason come within the meaning of "household goods," except as an incident of the movement of such establishment from one location to another, citing Commission decisions; that no inconsistency exits [*sic*] between the "intended use" test and the examiner's statement that "'*stock* in trade of drugstores" means stock kept for sale purposes by one who operates a drugstore; that the equivalent of "*stock* in trade of drugstores" is "drugstores' stock in trade"; that the important determination is what transportation was intended to be authorized; that plaintiff is authorized to transport the commodities described in its permit provided such commodities at the time of shipment are definitely intended for use as "store fixtures, household goods, or stock in

trade of drugstores"; that the commodity limitation in plaintiff's permit does not limit the class or type of persons with whom it may contract, as would a "Keystone" restriction as described in *Keystone Transp. Co., Contract Carrier Application*, 19 M. C. C. 475; that the "intended use" test has never been abandoned by the Commission; and that an appropriate order requiring plaintiff to cease and desist from the operations found to be unauthorized would be entered.

18. On March 17, 1955, the Commission issued its order requiring plaintiff to cease and desist from the operations found in the report of Division 5 to be unauthorized and unlawful.

19. Plaintiff filed a petition for reconsideration and oral argument on May 11, 1955; replies to the petition were filed on June 15, 1955; and the entire Commission denied the petition by order of November 15, 1955.

20. The Court adopts as its own the findings of fact made by the Commission, Division 5, as shown in its report on March 17, 1955.

Conclusions of Law.

1. The Commission had jurisdiction to hear and determine the issues involved in the proceeding which resulted in the order here under attack.

2. This Court has jurisdiction of the action herein and the parties hereto.

3. The plaintiff was accorded a full, fair and legal hearing.

4. The findings made by the Commission, Division 5, as set forth in its report of March 17, 1955, which the Court had adopted as its own, are supported by substantial evidence of record and are adequate to support the

order issued by the Commission.

5. The Commission did not exceed its authority in issuing its said order.

6. The order of the Commission under attack in this cause is a legal and valid order.

7. The injunction prayed for by the plaintiff should be denied and the suit dismissed.

8. Let a decree be entered in accordance with the conclusions expressed herein.

Dated: 13th day of June, 1956.

S/ PHILIP J. FINNEGAN,
United States Circuit Judge.

S/ WALTER J. LA BUY,
United States District Judge.

FOOTNOTES IN NO. 55-C-2302—NELSON V. UNITED STATES, ET AL.

1. 49 U. S. C. § 304(c), 54 Stat. 922, as amended September 18, 1940; 49 U. S. C. 312(a), 54 Stat. 924, as amended Sept. 18, 1940.

2. 49 U. S. C. § 309(a)(1), 64 Stat. 575, as amended September 1, 1950.

APPENDIX D.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Andrew G. Nelson, Inc., *Plaintiff*, *vs.* United States of America and Interstate Commerce Commission, *Defendants*, and Advance Transportation Co., Inc., *et al.*, *Intervening Defendants.*	No. 55 C 2302

DISSENTING MEMORANDUM OPINION.

JUDGE PERRY, dissenting:

In the proceedings initiated by the Interstate Commerce Commission and ending in the cease and desist order dated March 3, 1955, herein sought to be enjoined annulled, the Commission, in effect, sought to modify or curtail by retroactive interpretation the permit of plaintiff corporation, an interstate motor contract carrier and successor in interest to Andrew G. Nelson whose permit was issued under the "grandfather" clause in the first proviso to Section 209(a)(1) of the Interstate Commerce Act (49 U. S. C. 309(a)(1)).

The so-called "grandfather" clause reads, in part, as follows:

> "Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway * * * unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time * * * the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in sub-section (b) of this section * * *."

By its order of February 14, 1938, in "grandfather" case No. MC-1194, the Interstate Commerce Commission found that Andrew G. Nelson (plaintiff's predecessor) had made application for a permit to operate as a contract carrier by motor vehicle according to certain specifications, viz.:

> "The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:
>
> New and used store fixtures, new and used household goods, and stock in trade of drug stores.
>
> Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin".

and then the Order added: "and that the said applicant or predecessor in interest was in bona fide operation *in such manner* (italics supplied) on July 1, 1935, and has so op-

erated since that time; and the Commission so finding." That finding has never been changed, and remains in effect. In other words, the Commission's finding of fact was that the business of applicant during the "grandfather" period had been as a contract carrier of commodities described as new and used store fixtures, new and used household goods, and stock in trade of drug stores.

Now, let us turn to a consideration of some of the informational data that was on file in 1936 as a part of the record before the Commission in the "grandfather" case; data describing applicant's operations during the "grandfather" period, and on which, in part, at least, the Commission presumably based its administrative finding of fact in the order of February 14, 1938, just mentioned. Referring to plaintiff's exhibits, put into evidence herein by agreement of attorneys, we find certified, photostatic copies of the following documents:

(a) "Property Carrier Application" dated December 30, 1935, and made by Andrew G. Nelson. An exhibit, attached to and a part of the Application, contains the following statement by applicant:

"Operations involve transportation over various routes, between various municipalities, on various highways, of store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores."

(b) Statements made by Andrew G. Nelson when he appeared before Supervisor John G. Petritz on November 9, 1936, and reduced to writing and signed by him on November 11, 1936—paragraphs 7 and 8 whereof read as follows:

"7. That he is an interstate contract carrier of property for the Walgreen Company and for it alone.

"8. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodel-

ing and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock. That the household goods hauled are only for employees of the Walgreen Company and that payment for said transportation is taken care of by the Walgreen Company. This movement amounts to approximately ten trips per year. That his equipment usually returns empty, except for old store fixtures and equipment and occasionally a transfer of stock for Walgreen Company."

(c) Affidavit, dated November 12, 1935, of W. E. Henry, who states that he "is now, and has been for a number of years, engaged in the occupation of traffic manager for Walgreen * * * and that as such traffic manager it is his duty to, among other things, arrange and contract for, and order and supervise, the transportation of store fixtures and miscellaneous merchandise belonging to said Walgreen Co., and household goods of certain of said company's employees."

Affiant Henry further says "that Andrew G. Nelson * * * is on this date, and has been continuously since the year A. D. 1919, under contract with said Walgreen Co., to transport by motor vehicle over various routes, between various municipalities, on various highways, store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores, all over such state and federal highways within a radius of approximately six hundred (600) miles from Chicago, Illinois, as may be necessary to reach a Walgreen Co., drug store."

(d) Affidavit, dated November 10, 1936, of David Harding who states that he "is now and has been since 1920 engaged in the occupation of warehouse foreman for Andrew G. Nelson * * *. That it is his duty among other things to check loads, supervise the transportation of store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees."

Affiant Harding further says "that he has ordered the various motor vehicles over various routes * * * containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores * * *. Affiant further deposes and says the type of business done by Andrew G. Nelson * * * has not materially changed since his employment in 1920.

(e) Affidavit, dated November 10, 1936, of Jacob Jacoby who states that "he is now and has been since 1930 engaged in the occupation of chauffeur for Andrew G. Nelson, doing business as Nelson Warehouse & Express Co. * * * That it is his duty among other things to drive various vehicles containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees.

Affiant Jacoby further states "that he has driven various motor vehicles over various routes * * * containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores * * * and says the type of business done by Andrew G. Nelson as Nelson Warehouse & Express Co. * * * has not materially changed since his employment in 1930.

(f) Affidavit, dated November 10, 1936, of Robert Stewart who states that "he is now and has been since 1930 engaged in the occupation of chauffeur for Andrew G. Nelson, doing business as Nelson Warehouse & Express Co. * * * That it is his duty among other things to drive various vehicles containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees * * *.

Affiant Stewart further states that he has "driven various motor vehicles over various routes, between various municipalities * * * containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees,

> in connection with the opening, closing and remodeling of stores all over such states and federal highways within the radius of approximately six hundred (600) miles from Chicago, Illinois * * * that the type of business done by Andrew G. Nelson as Nelson Warehouse & Express Co. * * * has not materially changed since his employment in 1930.

Applicant Nelson, having established the fact that he was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, and having been accordingly issued a permit by the Commission pursuant to the "grandfather" clause, was granted by statute the right and authority to continue the grandfather operations in the same pattern. The Commission has no more authority or power now to specify, limit or diminish the scope of the operations authorized under the "grandfather" permit here involved than it had in 1942 when the permit was issued.

To permit the Commission to modify or restrict by retroactive interpretation a permit issued under circumstances such as those in the instant case would be to give the permit a protean quality, subjecting the holder thereof to possible deprivation of property without due process.

The power given the Interstate Commerce Commission by Congress to make regulations is one which is limited to the enforcement and application of the statute and to the carrying into effect of the will of Congress as expressed by the statute. It was never intended that the Commission be authorized to usurp the legislative function of Congress in any manner—whether it be done directly, by the promulgation of regulations which are not in harmony with the statute, or done indirectly by an interpretation of the statute, amounting to an amendment thereof. In the case at hand the Commission is, in effect, amending the statute.

Absent any charge and supporting proof of fraud in the inducement of the issuance of a permit, the findings of the Commission in the "grandfather clause" proceedings here involved were and are final and cannot be changed or modified; nor can new and different findings be made, based upon the same facts.

/s/ J. S. PERRY,
United States District Judge.

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

Andrew G. Nielson, Inc., *Plaintiff*, *vs.* United States of America and Interstate Commerce Commission, Et Al., *Defendants.*	Civil Action No. 55 C 2302

FINAL JUDGMENT AND DECREE.

The above entitled action having come on for final hearing before a duly constituted district court of three judges convened pursuant to Section 2284 and 2325 of Title 28, United States Code, and the Court having considered the pleadings and evidence, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its Findings of Fact and Conclusions of Law in said Action, in accordance with the said Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED, that the relief prayed for in the complaint be, and it is hereby denied, and the complaint is dismissed.

Dated this 13th day of June, 1956.

/s/ PHILIP J. FINNEGAN,
United States Circuit Judge.

/s/ WALTER J. LABUY,
United States District Judge.

APPENDIX F.

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 14th day of February, A. D. 1938

No. MC 1194.

APPLICATION OF ANDREW G. NELSON, DOING BUSINESS AS NELSON WAREHOUSE AND EXPRESS CO., CHICAGO, ILLINOIS.

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, including due service, made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding; therefore

It is ordered, That upon full compliance with the requirements of Sections 215 and 218 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of contract carrier rate publications and filing and approval of evidence of security for the protection of the public, and with the requirements established in Contracts of Contract Carriers*, 1 M. C. C. 628, a permit shall be issued, unless otherwise

ordered, authorizing said applicant to engage in interstate or foreign commerce, as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order,* unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That if applicant or any other party in interest desires to protest the issuance of such permit, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order,* a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said permit be withheld pending further investigation and order by the Commission. Otherwise such protests shall be denied.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 14th day of February, A. D. 1938.

No. MC 1194.

APPLICATION OF ANDREW G. NELSON, DOING BUSINESS AS NELSON WAREHOUSE AND EXPRESS CO., CHICAGO, ILLINOIS.

The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:

New and used store fixtures, new and used household goods and *stock* in trade of drug stores,

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.